Supreme Court, U.S.
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No. 94-1453

In The

Supreme Court of the United States

October Term, 1995

D. GRANT PEACOCK,

Petitioner,

v.

JACK L. THOMAS,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENT

J. KENDALL FEW
(Counsel of Record)
JOHN C. FEW
MARGARET A. CHAMBERLAIN

FEW & FEW, P.A.
Post Office Box 10085
850 Wade Hampton Boulevard
Greenville, SC 29603
(803) 232-6456

JAMES R. GILREATH
STEPHEN G. POTTS
JAMES R. GILREATH, P.A.
Post Office Box 2147
110 Lavinia Avenue
Greenville, SC 29602
(803) 242-4727

Attorneys for Respondent
Jack L. Thomas

September 6, 1995

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QUESTIONS PRESENTED

1. Can a federal court pierce the corporate veil to impose liability for an ERISA judgment on a person found to be the alter ego of the liable corporation?

2. Was the action to enforce the ERISA judgment properly before the district court?

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STATUTORY PROVISIONS INVOLVED

Section 409(a) of ERISA, 28 U.S.C. § 1109(a), provides in pertinent part as follows:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title . . . shall be subject to such other equitable or remedial relief as the court may deem appropriate. . . .

Section 502(f) of ERISA, 28 U.S.C. § 1132(f), provides in pertinent part as follows:

> The district courts of the United States shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action.

STATEMENT

This case involves two related actions by the Respondent, Jack L. Thomas ("Thomas") on behalf of the pension plan of Tru-Tech, Inc. ("Tru-Tech") and its participants. The first action established liability on the part of Tru-Tech for breach of fiduciary duty. Subsequent to the facts which gave rise to that action, the Petitioner, D. Grant Peacock, engaged in a course of conduct described in the district court's findings of fact found in the Petition for Certiorari on pages 40a through 42a. The findings of fact include the following:

1. The Petitioner "was the controlling shareholder and sole director of Tru-Tech" and "directed and controlled essentially all of its affairs." [Pet. App. 40a, ¶ 2].

2. "During the entire period from November 1986 through its ultimate dissolution in May of 1990, there was a failure to observe corporate formalities . . . and the corporate shell of Tru-Tech was merely a facade for the operation of the dominant will of [Petitioner]." [Pet. App. 40a, ¶ 3].

3. The Petitioner "directed the management of Tru-Tech's affairs to defeat the collection of the *Thomas* judgment by siphoning off the assets of the corporation to certain favored creditors owned or controlled by [Petitioner]." [Pet. App. 41a, ¶ 4].

4. The "assets of Tru-Tech were siphoned off by [Petitioner] pursuant to a corporate strategy developed by him. *It was the specific intent and purpose of this strategy to siphon off these assets* to favored creditors owned or controlled by [Petitioner] and to defeat collection of the *Thomas* judgment." [Pet. App. 42a, ¶ 7 (emphasis added)].

5. In his efforts to siphon off the assets of Tru-Tech, *"it was the specific intent of [Petitioner] to defraud the former employees of Tru-Tech* who were beneficiaries of the pension plan and to defeat their legitimate attempt to collect a lawful judgment." [Pet. App. 42a, ¶ 9 (emphasis added)].

6. "Under the facts of this case and in light of the clear legislative purpose of ERISA, it would be inequitable and unfair to allow Tru-Tech's corporate form to be misused for the purpose of depriving its employees of

their anticipated benefits and avoiding lawful financial obligations to an employee benefit plan under ERISA." [Pet. App. 42a, ¶ 11].

Evidence fully supporting all of these findings of fact is found in the district court's order in the Petition for Certiorari on pages 31a through 40a. This evidence includes two letters of Petitioner's Pittsburgh attorney dated November 28, 1988, and March 13, 1989, documenting the Petitioner's "settled . . . strategy" to "refrain" from payment of the *Thomas* judgment and keep his current attorneys involved in that appeal process while siphoning off the assets of Tru-Tech so as to render them judgment-proof. [Pet. App. 34a-35a]. Therefore, under the facts of this case, we have a Pennsylvania resident deliberately and successfully undermining the judgment of the United States District Court for the District of South Carolina in a way that both the district court and the Court of Appeals for the Fourth Circuit found to be utterly reprehensible. [*See* Pet. App. 15a, 24a, 41a and 42a].

The Fourth Circuit affirmed the district court's decision. In a unanimous opinion written by Judge Donald Russell and joined by Judge Widener and Senior Judge Chapman, the court held that the federal court had subject matter jurisdiction over the case because it arose under ERISA. Furthermore, the court ruled that the district court did not err by applying a federal common law standard for piercing the corporate veil.

Before tackling the authorities and policy considerations involved, we do take issue with Petitioner's characterization of the second of these two interrelated

actions as "a separate lawsuit brought for the purpose of collecting a prior federal judgment" [Petition for Certiorari, p. 2] and a "second, independent lawsuit." [Pet. Br. 2]. The Fourth Circuit rejected this same contention "that this suit is one merely to collect an outstanding judgment" [Pet. App. 11a] and that "once the plaintiff class won its judgment against Tru-Tech, it became a judgment creditor like any other." [Pet. App. 12a]. In rejecting this argument, the Fourth Circuit stated:

> We established above that an attempt to pierce the corporate veil is a matter of substantive law that determines *whether a corporate shareholder can be held liable for a preexisting judgment* entered against the corporation. An attempt to pierce the corporate veil, therefore, seeks to identify those parties against whom the judgment can be satisfied. . . . *[I]dentification of those parties who are liable* is necessarily antecedent to the procedural enforcement of the judgment against those parties. . . .

[Pet. App. 13a (emphasis added)]. This action, therefore, is not one to *collect* a judgment, but one to *establish liability* on the part of the Petitioner. If successful, Thomas may then be forced into the federal or state courts of Pennsylvania to *collect* his judgment against Petitioner, just as he was in his attempt to *collect* his judgment against Tru-Tech.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit is consistent with this Court's prior holdings and should be affirmed for the following reasons:

First, as held by the Fourth Circuit, liability was properly imposed upon the Petitioner under federal common law veil-piercing standards as an equitable remedy available under ERISA.

Second, as held by the Fourth Circuit under the doctrine of ancillary jurisdiction, federal courts have the inherent power and duty to protect their lawful judgments from "the assaults of the lawless." *See United States v. Barnette*, 376 U.S. 681, 699-700 (1964), *quoting Watson v. Williams*, 36 Miss. 331, 341-342 (1858). In addition to ancillary jurisdiction, the district court had jurisdiction under the broad, remedial scope and purposes of ERISA.

ARGUMENT

1. ERISA PERMITS THE APPLICATION OF FEDERAL COMMON LAW VEIL-PIERCING STANDARDS.

The policies of allowing a federal court to enforce its own judgments and of protecting the interests of participants in ERISA plans are the mainstays of the decisions of the district court and the Fourth Circuit. Allowing Thomas to pierce the corporate veil of Tru-Tech fits nicely into the ERISA remedial scheme. Such a remedy comfortably falls under the category of "other appropriate equitable relief" under ERISA § 502(a)(3). 29 U.S.C.

§ 1132(a)(3). In affirming the decision of the district court, the Fourth Circuit adopted a common equitable remedy which lies well within the bounds of ERISA's intended reach.

ERISA § 502(a) provides that

A civil action may be brought –

* * *

(2) . . . by a participant, beneficiary or fiduciary for appropriate relief under Section 1109 of this title; [or]

(3) by a participant, beneficiary or fiduciary . . . to obtain other appropriate equitable relief. . . .

29 U.S.C. § 1132(a)(2) and (3). The liability that was imposed upon the Petitioner by the Fourth Circuit was initially the liability of Tru-Tech for its breach of its duties as a plan fiduciary pursuant to ERISA § 409, 29 U.S.C. § 1109. The district court and the Fourth Circuit allowed Thomas to pierce the corporate veil of Tru-Tech as a means of providing "appropriate relief" or "appropriate equitable relief" under the terms of ERISA.

The relief provided to Thomas by the District Court and the Fourth Circuit does not broaden ERISA as the Petitioner asserts. The corporate veil of Tru-Tech was pierced to allow for the appropriate and adequate enforcement of the provisions of ERISA. The first section of ERISA states as follows:

> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employment benefit plans, *and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.*

29 U.S.C. § 1001(b) (emphasis added).

This Court has long acknowledged that "the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud or injustice." *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 322 (1939). ERISA was enacted in large part to protect employees from being deprived of their benefits, *See* 29 U.S.C. § 1001 (1982). ERISA clearly provides for piercing the corporate veil in this case where the Petitioner deliberately siphoned off Tru-Tech's assets in an effort to prevent the employees from collecting the money due them as a result of the first action. Had the Petitioner not been held accountable for the liability of Tru-Tech, which had been rendered worthless by his efforts, the enforcement provisions of ERISA would have been stripped of any significance. To permit such actions to escape scrutiny from the federal courts as a matter of law would transmute ERISA to a mere snare and illusion effectively eliminating the employee protection promised by Congress.

a. *Mertens* Does Not Preclude The ERISA Veil-Piercing Relief.

The Petitioner mistakenly believes that *Mertens v. Hewitt Associates*, 113 S. Ct. 2063 (1993), would bar the veil-piercing relief awarded by the district court and the Fourth Circuit. *Mertens* is clearly distinguishable from this action. In *Mertens*, both the relief sought and the

defendant's actions giving rise to the plaintiff's claim were entirely different from this case.

The plaintiff in *Mertens* attempted to recover compensatory damages against a plan actuary for the actuary's role in the plan fiduciary's breach of duty. This Court refused to allow a separate cause of action to be brought under ERISA against a non-fiduciary for monetary damages. The relief awarded by the district court and the Fourth Circuit in the case at bar, however, did not arise from a separate cause of action for monetary damages but from an equitable remedy fashioned to further the policies of ERISA. "[A]n attempt to pierce the corporate veil is not itself a cause of action but rather is a means of imposing liability on an underlying cause of action, such as a tort or breach of contract." *Fletcher Cyclopedia of Corporation* § 41, p. 603 (Perm. ed. 1990). Unlike *Mertens*, a new cause of action is not being fashioned to permit recovery from a party not intended to be subject to such liability under ERISA. Thomas is merely seeking to keep an ERISA judgment from being rendered worthless by the wrongful acts of the Petitioner.

The holding in *Mertens* would allow "equitable relief" in an action against a nonfiduciary. "The alter ego doctrine is based in equity and is remedial in nature." 18 C.J.S. *Corporations* § 12, p. 280. Thomas concedes that the relief ordered by the district court and the Fourth Circuit would force the Petitioner to pay money to Thomas. However, the Petitioner's liability for such payment arises from a disregard for Tru-Tech's corporate form and from his disregard for the authority of the federal courts. The relief awarded by the district court and the Fourth Circuit does not subject a nonfiduciary to money damages. Such relief comes in the form of removing the

corporate veil to expose the Petitioner as the responsible party for Tru-Tech's judgment liability. The relief granted was removal of the veil, not the money damages.

The procedure followed by Thomas in seeking to enforce the ERISA judgment is analogous to another procedure available to enforce judgments commonly referred to as supplementary proceedings. "Supplementary proceedings are equitable in nature." *Ag-Chem Equipment Co., Inc. v. Daggerhart*, 315 S.E.2d 379, 381 (S.C. App. 1984), *citing The Firestone Tire & Rubber Co. v. Marlboro Cotton Mills*, 278 F. 816 (D.S.C.), *modified*, 282 F. 811 (4th Cir. 1922), *cert. denied*, 260 U.S. 749 (1923). Thus, there is no doubt this action involves "relief that [is] typically available in equity." *Mertens, supra*, 113 S. Ct. at 2069.

Another typical form of equitable relief mentioned by the Court in *Mertens* is restitution. While money damages may be exchanged as a result of a judgment for restitution, the remedy is nonetheless equitable. Here, the relief granted Thomas merely removes the corporate impediment, thereby necessitating a payment of money.

The Petitioner cites *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1995) as authority for his contention that "[e]ven if this action could be viewed as seeking equitable relief, it could not be maintained under ERISA . . . [because] there is no allegation of any violation of ERISA or an ERISA plan." [Pet. Br. 17, n. 8]. Distinguishable on its facts, *Reich* involves a claim against a financial consultant who provided services to an ERISA plan. *Reich* actually supports Thomas' claim. In *Reich*, the First Circuit explains:

> We are more willing to create common law remedies that are directed toward undoing specific transactions or recovering assets of an ERISA plan. In those situations, the parties are more likely to be in control of plan assets and thus functionally more likely fiduciaries.

Reich, supra, 20 F.3d at 33. The actions of the Petitioner in siphoning off assets of Tru-Tech should subject him to liability under the form of equitable relief fashioned by the Fourth Circuit.

In *Mertens,* this Court was concerned about disturbing the balance "between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs" provided by the ERISA civil enforcement provisions. *Mertens, supra,* 113 S. Ct. at 2072, *quoting Alessi v. Raybestos-Manhattan, Inc.,* 101 S. Ct. 1895, 1902 (1981). In this action, there is no danger that pension costs will rise if the Petitioner is held liable for the Tru-Tech judgment. The relief awarded by the district court and the Fourth Circuit will not "impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." *Mertens, supra,* 113 S. Ct. at 2072. It is extremely doubtful that an insurance product is available to cover a person for intentionally siphoning off assets from his alter ego corporation. Imposing liability on the Petitioner may actually lower pension costs by allowing recovery against persons "functionally more like fiduciaries." *Reich, supra,* 20 F.3d at 33.

A final distinction between *Mertens* and the case currently before the Court involves the actions of the respective defendants. In *Mertens,* the plaintiffs, former

employees entitled to benefits under their employer's pension plan, attempted to hold the actuary for their pension plan liable after the actuary failed to provide accurate actuarial assumptions to the employer. As a result, the employer did not adequately fund the plan, and the employees were denied their full pensions. The actuary's shortcomings, however, pale in comparison with the dishonest, deceitful behavior of the Petitioner who masterminded and executed a scheme to "defeat the collection of the Thomas judgment by syphoning off the assets of the corporation. . . . " [Pet. App. 41a, ¶ 4]. Not only was it the specific intent of the Petitioner to "defraud the former employees of Tru-Tech," [Pet. App. 42a, ¶ 9], it was also his intent to scoff at the rulings of the federal courts. Petitioner's egregious and reprehensible behavior dwarfs the failures of the actuary in *Mertens.*

The Petitioner argues that relief in the form of piercing the corporate veil should not be available because ERISA already contains a standard for reaching beyond the corporation by way of ERISA's definition of "fiduciary." The actions of the Petitioner which exposed him to liability for the Tru-Tech judgment did not occur with respect to the administration or operation of the plan. The Petitioner's culpable behavior occurred after the breach of fiduciary duty from which the Tru-Tech liability arose. Therefore, the relief the Petitioner suggests as available to Thomas would not be available in this case. The only appropriate and adequate relief available to Thomas was that awarded by the district court and the Fourth Circuit.

b. State Courts Would Not Have Proved An Appropriate And Adequate Forum.

The Petitioner cites *Mackey v. Lanier Collection Agency & Service*, 486 U.S. 825 (1988), for authority that ERISA does not provide a means of enforcing ERISA judgments. This is not a fair representation of *Mackey*.

Mackey involved an action instituted in a state court of Georgia by a collection agency seeking to garnish the benefits of the members of an ERISA welfare benefits plan. The case also turned on the applicability of a Georgia state law prohibiting the garnishment of plan benefits covered by ERISA. In *Mackey*, this Court held that ERISA preempted the state garnishment procedure thereby setting aside the anti-garnishment provision, and, because ERISA did not provide a procedure for collecting judgments against plan participants, the judgment creditor was allowed to proceed against the plan assets.

The Petitioner enthusiastically embraces and relies upon this Court's statement in *Mackey* that "ERISA does not provide an enforcement mechanism for collecting judgments won. . . . " *Id.* at 833. The Fourth Circuit's decision, however, does not conflict with *Mackey*. The Petitioner's reliance upon this statement is misplaced. *Mackey* does not preclude the application of a federal common law veil-piercing rule in actions under ERISA. An attempt to pierce the corporate veil is not a means of collecting a judgment; it is a means of imposing liability. Applying the general purposes and principles of ERISA, Thomas seeks to pierce Tru-Tech's corporate veil in order to hold the Petitioner liable for the actions of his sham

corporation. This action clearly cannot be a mere collection action because Thomas may yet have to bring a collection action under state law to collect the judgment against the Petitioner if this Court affirms the Fourth Circuit's decision.

Mackey simply did not involve a judgment creditor seeking enforcement of an ERISA judgment. There is a definite distinction between a holding that ERISA does not provide a mechanism to enforce judgments against an ERISA plan and the assertion that ERISA does not provide an enforcement mechanism to enforce *ERISA judgments*.

Petitioner argues that ERISA does not preempt state laws regarding piercing the corporate veil and then leaps to the conclusion that, since ERISA does not preempt state law regarding piercing the corporate veil, suits such as this one are not covered by ERISA and must be brought under state law. As discussed above, Thomas' action to pierce the corporate veil of Tru-Tech is not a separate cause of action but simply a supplemental proceeding to impose liability for an ERISA judgment on a sham corporation's alter ego. Thomas is pursuing "other appropriate equitable relief." 29 U.S.C. § 1132(a)(3). Any state statute or state court decision that attempts to regulate the availability of the veil-piercing remedy for ERISA judgments would be preempted. In *Mackey*, the Court stated as follows:

> Consequently, adhering to our precedents in this area, we hold that Ga. Code Ann. § 18-4-22.1, which singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures, is preempted under § 514(a). The state statute's

> express reference to ERISA plans suffices to bring it within the federal law's pre-emptive reach.

Mackey, supra, 486 U.S. at 830.

The Petitioner argues that "[a]llowing the states to maintain their traditional standards for veil-piercing would do nothing to undermine a 'uniform body of benefits laws.' " [Pet. Br. 24]. A federal court must be able to " . . . vindicate its authority, and effectuate its decrees . . . . " *Kokkonen v. Guardian Life Ins. Co. of America,* 114 S. Ct. 1673, 1675-1676 (1994). As the Fourth Circuit explained:

> [A]n attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action, it is not simply an attempt to collect a preexisting liability against an entity already found liable under the relevant substantive law; it is, rather, an attempt to impose such a preexisting liability upon an entity *not otherwise liable.*

[Pet. App. 12a].

The policy of protecting "the interests of participants in employee benefit plans" must be uniformly upheld. 29 U.S.C. § 1001(b). Such uniformity cannot be accomplished by forcing participants to resort to state law in instances such as the present action where the Petitioner has made a mockery of an ERISA judgment. If this Court holds that an action to pierce the corporate veil may only be brought under state law and not under a federal common law fashioned under ERISA, it would undermine the "uniform body of benefits law." *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 115 S. Ct. 1671, 1677 (1995). If the standards for enforcing an ERISA

judgment become a matter of state law, uniformity will effectively be written out of ERISA. By applying the federal veil-piercing standard enunciated by the First Circuit in *Alman v. Danin,* 801 F.2d 1 (1st Cir. 1986), the Fourth Circuit has not extended the causes of action available under ERISA, but has merely reinforced the remedies currently available under ERISA.

The ability of ordinary creditors of a corporation to look beyond the corporate veil for recovery is limited since such parties knowingly deal with an entity with limited liability. An ERISA plan participant, however, has a higher degree of expectation for recovery because the plan represents that a contribution will be made and administered pursuant to a fiduciary obligation. Such an expectation must be given preference over ordinary creditors. Such a preference can only be provided by a uniform enforcement procedure for ERISA judgments that would include a remedy allowing piercing of the corporate veil.

The Petitioner argues that piercing the corporate veil is a matter that should be left for adjudication by the states. Had this been a traditional state law contract or tort cause of action resulting in a judgment against the corporation by a federal court, the Petitioner's argument would be more persuasive. Because the veil-piercing remedy is sought as a result of an ERISA judgment, however, the mandates of ERISA demand an ERISA action to pierce the corporate veil.

In explaining the standard for piercing the corporate veil, which was later adopted by the Fourth Circuit in this case, the First Circuit in *Alman v. Danin* concluded:

> ERISA, the statute sought to be enforced here, cannot be said to attach great weight to corporate form. Indeed, deferring too readily to the corporate identity may run contrary to the explicit purposes of the Act. Congress enacted ERISA in part because many employees were being deprived of anticipated benefits, which not only reduced the financial resources of individual employees and their dependents but also undermined the stability of industrial relations generally . . . allowing the shareholders of a marginal corporation to invoke the corporate shield in circumstances where it is inequitable for them to do so and thereby avoid financial obligations to employee benefit plans, would seem to be precisely the type of conduct that Congress wanted to prevent.

801 F.2d at 3-4. If federal common law relating to piercing the corporate veil is not applied in situations such as the one before this Court, not only will the uniformity envisioned by ERISA be destroyed but plan participants will be denied the protection ERISA was designed to provide.

The Petitioner expresses concern that applying a federal common law doctrine of veil-piercing "would free federal courts to impose ERISA liability on corporate officers and shareholders whenever such a result is deemed consistent with the policy ensuring full collection of all ERISA judgments." [Pet. Br. 28]. It is simply unbelievable that this Court's decision affirming the Fourth Circuit would send shockwaves through the retirement plan industry. Liability has been imposed upon the Petitioner as a result of his willful acts designed to frustrate Thomas' collection of an ERISA judgment. Petitioner's actions could easily become the basis for a "How To"

manual on defeating ERISA judgments. Uniform standards for piercing the corporate veil which are aimed at preventing such actions would only affect parties with a similar blatant disregard for the federal courts and the policies and goals behind ERISA. In short, state law cannot adequately provide the necessary uniform remedy.

2. THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION OVER THIS ACTION.

a. The District Court Had Jurisdiction Under the Doctrine of Ancillary Jurisdiction.

The doctrine of ancillary jurisdiction is described in 13 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3523 (1984) as follows:

> The most important instance in which the federal courts hear cases over which no subject matter jurisdiction is expressly conferred on them by the Constitution, or by federal statute, is when the ill-defined concept of "ancillary jurisdiction" is invoked. According to this concept, a district court acquires jurisdiction of a case or controversy in its entirety, and, as an incident to the disposition of the matter properly before it, it may decide other matters raised by the case of which it could not take cognizance were they independently presented. Thus, if the federal court has jurisdiction of the principal action, it also may hear any ancillary proceeding therein, regardless of the citizenship of the parties, the amount in controversy, or any other factor that normally would determine subject matter jurisdiction. . . .

As to the basic underlying purpose of ancillary jurisdiction, the treatise states further:

> Ancillary jurisdiction exists because without it the federal court neither could dispose of the principal case effectively nor *do complete justice* in the dispute that is before the tribunal. Viewed from this perspective then, the concept is a common-sense solution to the problems of piecemeal litigation that otherwise would arise by virtue of the limited jurisdiction of the federal courts prescribed in Article III and the complexity of many modern lawsuits.

Id. (emphasis added).

As to the scope of ancillary jurisdiction:

> The concept also is broad enough to include those acts that the federal court must take in order properly to carry out its judgment on a matter as to which it has jurisdiction. *This general principle is one of broad application,* although of rather uncertain limits. For example, it has been held that *mandamus* or *scire facias* will lie *to effectuate relief granted in the main action. . . .*

Id. (emphasis added).

In *Kokkonen, supra,* this Court described the "two separate, though sometimes related, purposes" of ancillary jurisdiction as follows:

> . . . Generally speaking, we have asserted ancillary jurisdiction . . . for two separate, though sometimes related, purposes: (1) to permit disposition by a single court of claims that are, in

> varying respects and degrees, factually interdependent . . . ; and (2) *to enable a court to function successfully,* that is, to manage its proceedings, *vindicate its authority, and effectuate its decrees. . . .*

114 S. Ct. at 1675-1676 (emphasis added).

The concern of the federal courts for the vindication of their authority and the effectuation of their decrees is not a novel or recent phenomenon. It appears to have been foremost in the mind of Chief Justice Marshall in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803), and has been a concern of this Court ever since.

As this Court noted in *Bank of the United States v. Halstead,* 23 U.S. (10 Wheat.) 51 (1825):

> The judicial power would be incomplete, and entirely inadequate to the purposes for which it was intended, if after judgment, it could be arrested in its progress, and denied the right of enforcing satisfaction in any manner which shall be prescribed by the laws of the United States. The authority to carry into complete effect the judgments of the Courts, necessarily results, by implication, from the power to ordain and establish such Courts.

Id. at 53. This Court's decision in *Freeman v. Howe,* 65 U.S. (24 How.) 450 (1860), further emphasizes the jurisdiction of the federal courts over supplemental matters:

> The principle is, that a bill filed on the equity side of the court to retrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under *mesne* or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it

> had arisen, and is maintained without reference to a citizenship or residents of the parties.

Id. at 460.

In *Barnette, supra*, 376 U.S. at 699-700, when the authority of the federal judiciary was challenged and undermined by the Governor and Lieutenant Governor of Mississippi, this Court stressed the importance of enforcing the authority of the federal courts. The opinion by Justice Clark quoted with approval "the statement of the High Court of Errors and Appeals of Mississippi 105 years ago in *Watson v. Williams*, [36 Miss. 331 (1858)]." The Court referred to *Watson* as "a celebrated case that has been cited with approval in many state jurisdictions as well as cases in this Court," *Barnette, supra*, 376 U.S. at 695, and described the following quotation "as true and perhaps even more urgent today":

> A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments, or decrees against the recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it. . . . The power to compel the lawless offender, against decency and propriety, to respect the laws of its country, and to submit to their authority (a duty to which the good citizen yields hearty obedience, without compulsion) must exist, or courts and laws operate at last as a *restraint* upon the upright, who need no restraint, and a license to the offenders, whom they are made to subdue.

Certainly, a less persuasive case for the exercise of ancillary jurisdiction is found in *Board of County Commissioners of Labette County v. United States*, 112 U.S. 217

(1884). In that case, a judgment had been obtained in the Circuit Court of the United States for the District of Kansas against the Township of Oswego. The judgment against Oswego, like the *Thomas* judgment, remained unpaid. A Writ of Mandamus was then issued by that court directed to the Board of County Commissioners of Labette County requiring them to levy and collect sufficient taxes to satisfy the judgment. They demurred to the writ on the grounds that "the court has no jurisdiction of the persons of the respondents or the subject of the action." In rejecting that contention, in an opinion by Justice Matthews, this Court stated:

> The objection that the circuit court had no jurisdiction to issue its *mandamus* to the plaintiffs in error is based upon the supposition that, because they are not parties to the judgment against Oswego township, and are not officers of or representatives of that municipal corporation, but are officers of the county of Labette, the proceeding against them is the exercise of an original jurisdiction, which does not belong to that court. It is quite true, as it is familiar, that there is no original jurisdiction in the circuit courts in *mandamus*, and that the writ issues out of them only in aid of a jurisdiction previously acquired, *as is justified in such cases as the present as the only means of executing their judgments.* But it does not follow because the jurisdiction in *mandamus* is ancillary merely *that it cannot be exercised over persons not parties to the judgment sought to be enforced.* . . .
>
> The question is whether the respondents, to whom the writ is addressed, have the legal duty to perform, which is required of them, and

> whether the relator has a legal right to its performance from them, by virtue of the judgment he has already obtained. *If so, then they are, as here, the legal representatives of the defendant in that judgment, as being the parties on whom the law has cast the duty of providing for its satisfaction.* They are not strangers to it, as being new parties, on whom an original obligation is sought to be charged, *but are bound by it, as its stands, without the right to question it, and under a legal duty to take those steps which the law has prescribed as the only mode of providing means for its payment.*

Id. at 220-221 (emphasis added).

The respondents in that case became "the parties on whom the law has cast the duty of providing for [the] satisfaction" of that outstanding judgment by virtue of their office. Here, the Petitioner has made himself responsible for this judgment by his unlawful action in siphoning off the assets of Tru-Tech "to defeat collection of the *Thomas* judgment" and to undermine the lawful authority of the district court.

Petitioner erroneously asserts that *H.C. Cook Co. v. Beecher,* 217 U.S. 497 (1910) requires reversal of the Fourth Circuit's decision. Petitioner makes the astounding assertion that "the only link between this case and *Tru-Tech* is that Respondent's purpose is to obtain payment on the *Tru-Tech* judgment from *someone*. . . . " [Pet. Br. 13]. Thomas is not merely seeking payment from *someone*; he is seeking to impose liability on the sham corporation's alter ego – the Petitioner. The Fourth Circuit's decision is not in conflict with *Beecher. Beecher* addresses litigation which is truly independent from prior actions. Thomas' effort to pierce the corporate veil is not independent of

his prior litigation. As the Fourth Circuit indicated, "an attempt to pierce the corporate veil is necessarily subsidiary to some primary cause of action." [Pet. App. 12a].

It is also important to note that *Beecher* was decided before Federal Rule of Civil Procedure 69(a) was adopted. Rule 69(a) provides in pertinent part:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought. . . .

Thus, Rule 69(a) provides a procedural mechanism for a court's exercise of its inherent jurisdiction to enforce its judgments in supplemental proceedings.

The Fourth Circuit's decision is also in keeping with *Kokkonen, supra.* Although this Court in *Kokkonen,* as pointed out by the Petitioner [Pet. Br. 13], declined to extend the concept of ancillary jurisdiction to "a claim for breach of contract" arising out of a settlement agreement, there was no suggestion there, as here, that such action was necessary "to enable a court to function successfully" or to "vindicate its authority, and effectuate its decrees." *Kokkonen, supra,* 114 S. Ct. at 1675-1676.

The federal courts have inherent jurisdiction to enforce their judgments in supplemental proceedings.

> [I]f the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such

> judgment or decree. . . . [T]he jurisdiction of a court is not exhausted by the rendition of the judgment, but continues until that judgment shall be satisfied.

Riggs v. Johnson County, 73 U.S. (6 Wall.) 166, 187 (1867).

Just as clearly as the Governor and Lieutenant Governor of Mississippi sought to undermine the lawful orders of the district court and Court of Appeals in *United States v. Barnette, supra*, Petitioner has thus far successfully undermined the lawful orders of the district court and the Court of Appeals. This has been accomplished by what the district court characterized as "the specific intent and purpose of [Petitioner's] strategy to siphon off [the] assets [of the judgment debtor] to favored creditors owned or controlled by [Petitioner] and to defeat collection of the *Thomas* judgment." [See Pet. App. 42a, ¶7].

If the district court cannot "vindicate its authority and effectuate its decrees," *Kokkonen, supra*, through the doctrine of ancillary jurisdiction, then it will become, in the colorful language of *Watson v. Williams, supra*, "a disgrace to the legislation" that created it, "and a stigma upon the age which invented it."

b. The District Court Had Jurisdiction Under ERISA.

As discussed at length in Part 1, this is an action brought under the enforcement provisions of ERISA to enforce an ERISA judgment, not a separate cause of action. Although the doctrine of ancillary jurisdiction supports the district court's jurisdiction over this matter, jurisdiction is also provided by the provisions of ERISA.

The complaint in the first action invoked the court's equitable jurisdiction under ERISA by seeking relief both under ERISA § 409(a) and § 502(a). Under ERISA § 409(a), the court may grant "such other equitable or remedial relief as the court may deem appropriate." 28 U.S.C. § 1109(a). Under ERISA § 502(a), a plan participant may "obtain other appropriate equitable relief." 28 U.S.C. § 1132(a)(3).

The complaint in the present action incorporated the original complaint by reference in ¶5 [J.A. 44-45], specifically invoked the court's power to pierce the corporate veil "under ERISA and applicable federal law" [J.A. 49-50] and sought "such other relief as may be appropriate." As argued above, "applicable federal law" would include the doctrine of ancillary jurisdiction. Furthermore, under the broad remedial purposes of ERISA, appropriate equitable relief must be available to protect the interests of plan participants or ERISA itself becomes a toothless dragon offering no protection to vulnerable employees.

Furthermore, this action is not an independent action for monetary damages. The purpose of piercing the corporate veil is to prevent fraud or injustice. *See Taylor v. Standard Gas Co., supra*, 306 U.S. at 322. One would be hard pressed to imagine a more shocking example of injustice to plan beneficiaries than the Petitioner's efforts to subvert the authority of the federal courts by defeating the collection of a lawful judgment. Thomas does not bring an independent action for monetary damages; he brings an equitable action to satisfy a lawful judgment and thereby defend the authority of the court which issued it.

Public policy and the ends of justice support the extension of jurisdiction under ERISA to pierce the corporate veil and to impose liability upon those who would undermine the authority of our federal courts. Section 502(f) of ERISA provides that "district courts of the United States shall have jurisdiction . . . to grant the relief provided for in subsection (a) of this section in any action." 29 U.S.C. § 1132(f). As previously discussed, this action involves an attempt by a plan participant to enforce plan provisions by seeking to impose liability for an ERISA judgment on the Petitioner. This is a continuation of an ERISA action and, as such, is covered by the original jurisdiction afforded the action by ERISA.

Finally, under both the doctrine of ancillary jurisdiction and under ERISA, the provisions for nationwide service of process under ERISA are available to Thomas to allow him to enforce the ERISA judgment effectively and thus prevent Petitioner from rendering the ERISA civil enforcement provisions impotent. Pursuant to 29 U.S.C. § 1132(e)(2), "process may be served in any other district where a defendant resides or may be found." Thus, ERISA provides for nation-wide service of process.

CONCLUSION

For the reasons set forth above, the judgment of the Fourth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

J. KENDALL FEW
JAMES R. GILREATH
JOHN C. FEW
MARGARET A. CHAMBERLAIN
STEPHEN G. POTTS
Attorneys for Respondent

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